Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1012

FRIBESCO S.A. and OTELLO MANTOVANI,

Petitioners,

against

MITSUI & CO., (U.S.A.), INC., FINAGRAIN S.A. COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE a/k/a "FINAGRAIN" COMPAGNIE COMMERCIALE AGRICOLE FINANCIERE S.A., R. PAGNAN & F.LLI, LOUIS DREYFUS CORPORATION and TRADAX OVERSEAS, S.A.,

Respondents.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF FOR RESPONDENT MITSUI & CO. (U.S.A.) INC., IN OPPOSITION

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INTRODUCTION

The petition for writ of certiorari is presented on behalf of two separate petitioners in four separate proceedings, all of which were commenced in the Supreme Court of the State of New York for New York County. This brief is submitted in

opposition to the petition of Fribesco, S.A. ["Fribesco"], which is hereinafter sometimes referred to as the petitioner, on behalf of Mitsui & Co. (U.S.A.), Inc. ["Mitsui"] which is hereinafter sometimes referred to as the respondent.

JURISDICTION

Respondent Mitsui does not agree that this Court has jurisdiction, under 28 U.S.C. 1257(3) at least with respect to petitioner's objection to the panel of arbitrators. It contends, as more particularly set forth later in this brief, that no federal question exists with respect to that matter.

RE-STATEMENT OF THE QUESTIONS PRESENTED

We disagree with the petitioner's view of the questions presented and submit that, properly set forth, they are more simply stated, as follows:

1. Whether any public policy forbids the submission to arbitration of the respondent's claim against petitioner for breach of the contract between them, which expressly provides for arbitration thereof?

2. Assuming that this Court finds it has jurisdiction over this question, which we deny,—should the Court refuse enforcement of the contract method for appointment of arbitrators under the Grain Arbitration Rules of the American Arbitration Association and order advance disqualification of any panel which may be so appointed?

ADDITIONAL STATUTORY, TREATY AND REGULATORY PROVISIONS

UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ARTICLE II
9 U.S.C. following §201 (printed in Appendix A., p. 1)

DEPARTMENT OF AGRICULTURE REGULATIONS 7 C.F.R. 26.46(e); 26.48(a) and (e); 26.50(a) and (b); 26.110(d) prior to amendment of July 31, 1975; 26.110(d)(3) as amended July 31, 1975. (printed in Appendix A, pp. 2, 3)

NEW YORK CIVIL PRACTICE LAW and RULES §7504 (printed in Appendix A, p. 4)

RE-STATEMENT OF THE CASE

The petitioner's statement requires expansion to outline the specific facts in the dispute between Mitsui and Fribesco.

The contract, dated December 6, 1974, provided for the sale by Mitsui of 25,000 long tons of corn at $157 per 1000 kilos, for delivery into a ship to be provided by Fribesco. In accordance with the contract, Fribesco as buyer nominated the vessel "Sydney Bridge" which arrived, for loading, at the port of New Orleans, on July 29, 1975.

Although, as it claimed in the New York Courts, Fribesco had become concerned in late 1974, about the quality of U.S. corn, it took no steps as permitted by Department of Agriculture regulations, to arrange for inspection of the grain by officials of the Department, and took no other action allowed to it under such regulations, for its protection. Instead, on arrival of the vessel, Fribesco demanded sampling by a method not provided for in the contract, and other than as required by Department of Agriculture regulations, and when such method of sampling was refused by the grain elevator, Fribesco refused to accept delivery and withdrew the ship.

The same vessel then was loaded with grain at another elevator, where the corn was sampled and inspected by the same method which Fribesco had rejected from Mitsui. At the time of such rejection and alternative purchase, the market price of the product had decreased by almost $30 per 1000 kilos, and Fribesco has never disputed Mitsui's contention that it obtained the advantage of that lower price on purchasing the alternative supply.

When Mitsui demanded arbitration of its claim for breach of contract, Fribesco commenced a proceeding, in the New York Courts under New York procedural law [CPLR 7501 et seq] for the stay of arbitration which has been denied by the New York courts.

ARGUMENT

POINT I

PETITIONER HAS NOT SHOWN THAT ANY SUBSTANTIAL FEDERAL QUESTION EXISTS; AND NO PUBLIC POLICY FORBIDS THE ARBITRATION OF THE CONTROVERSY BETWEEN THE PARTIES

Petitioner challenges the arbitrability of the dispute upon two grounds: (1) It asserts that the Grain Standards Act required sampling of the grain "at the spout" while in the process of loading aboard ship, and that sampling by the method required and approved by the Department of Agriculture is unlawful. (2) It asserts that the clause in the contract which provides that the official certificate of inspection shall be final as to quality and condition, is unlawful. Petitioner urges that its contentions require analysis of complex provisions of the statute and of the Department of Agriculture regulations and that arbitrators should not be entrusted with that task.

Fribesco's premises, however, are incorrect. The statute did not, and even after subsequent amendment in 1976 to tighten the inspection procedures, still does not require sampling of the grain "at the spout". It then required merely that inspection be made "on the basis of official samples taken after final elevation as the grain is being loaded" [7 USC §77 prior to 1976 amendment]. The regulation of the Department of Agriculture, issued for implementation of the Act and in accordance with its powers under 7 USC §84 (now §75a) required that "the samples must be obtained after the final vertical elevation, at such place or places in such manner as will

obtain the most representative sample, and otherwise in accordance with the instructions" [7 C.F.R. 26.110 (3), prior to 1976 amendment].

At the time when delivery was to be made, the Department required that wherever an "automatic diverter sampling system" was available at a grain elevator, (as it was in the elevator from which delivery was to be made by Mitsui), no other method of sampling could be used. That system of sampling became mandatory, for all elevators by regulation effective November 1, 1975. [40 F.R. 32948] (App. A, page 3)

Even the 1976 amendments to the Grain Standards Act by Public Law 94-582, which was intended to improve the inspection system, merely required that samples be drawn "as near the final spout . . . as physically practicable", [7 USC 77(a)(1)] and under such amendment, the amended regulation 26.110 (as printed in petitioner's Appendix D, pp. A17-23) still does not require sampling at the spout.

Thus, petitioner's premise that sampling at a place other than the spout is illegal, is without foundation.

Nor is there any illegality in the contract clause which provides that the inspection certificate, to be issued by the Department of Agriculture, shall be final as to quality and condition. The fact that the Act [7 USC 79(d)] makes such a certificate *prima facie* evidence of the truth thereof in court, does not mean that the parties may not agree that, as between themselves, it shall be final. Such a provision is similar to the provision in a construction contract which makes an architect's certificate as to conformity and completion final and binding. Clear and unambiguous agreements to that effect are entirely lawful. *United Pacific Insurance Co.* v. *County of Flathead, et al,* 499 Fed 2d 1235 (C.A. 9, 1974); *Arkin Construction Co., Inc.* v. *Reynolds Metals Company,* 310 Fed 2d 11 (C.A. 5 1962); *Merchantile Trust Company* v. *Hensey,* 205 U.S. 298 (1907).

Petitioner relies heavily upon a number of precedents in which an agreement of arbitration has been denied enforce-

ment on public policy grounds. *Wilko* v. *Swan,* 346 U.S. 427 (1958) held that, since waiver of rights granted by the Securities Act of 1933 is prohibited by the statute, which also provided for a right of action thereunder, an agreement to arbitrate such a claim is contrary to law. *American Safety Equipment Corp.* v. *J. P. Maguire & Co.,* 391 F 2nd 821 (C.A. 2, 1968), held that a contention that the contract between the parties was void under the antitrust laws was not subject to arbitration under the contract, the Court holding that Congress did not intend such issues to be resolved elsewhere than in the Courts. To the same effect is *Helfenbein* v. *International Industria, Inc.,* 438 Fed 2nd 1068 (C.A. 8, 1971). In *Lewis* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 431 F. Supp 271 (E.D. Pa, 1977), the Court found that a provision against waiver of rights, similar to that contained in the Securities Act of 1933, should prevail against an agreement to arbitrate. The patent cases upon which petitioner relies, *Lear* v. *Adkins,* 395 US 653 (1969), *Beckman Instruments* v. *Technical Development Corp.,* 433 F. 2nd 55 (C.A. 2, 1970) and *Diematic Mfg. Corp.* v. *Packaging Industries, Inc.,* 381 F Supp 1057 (SDNY 1974) are also of similar import: since patents create monopolies and represent an exception to the antitrust laws, a challenge to their validity involves a determination whether the antitrust laws apply.

In all of these cases, the determination was made on the basis that the constracts contained provisions either themselves unlawful or whose interpretation by arbitrators could result in condonation of unlawful conduct; and in addition the Courts found that the statutes involved provided a remedy by action at law which Congress intended to be exclusive.

No such circumstances are here present. The contract for the sale of grain was lawful, nor did it require Fribesco to waive any statutory rights or any right of legal action provided thereby as a remedy.

As a matter of fact, Fribesco, as a buyer, was granted certain administrative rights under the Department of Agricul-

ture regulations, e.g. the right in advance of original inspection to require appeal inspection by a field office of the Department of Agriculture [7 C.F.R. 26.46(e); 26.48(a)][1] based upon new samples [7 C.F.R. 26.48(e)][1] and to request an appeal inspection by the Board of Appeals of the Department of Agriculture [7 C.F.R 26.50(a)(e)][1]. Nevertheless, Fribesco never availed itself of any such rights.

To the contrary of the decisions upon which petitioner relies is *Scherk* v. *Alberto-Culver,* 417 U.S. 506 (1974) in which this Court disallowed an attempt to evade arbitration on grounds similar to those sustained in *Wilko* v. *Swan, supra.* This Court held that the contract was international in character, as is the contract between Mitsui and Fribesco,[2] and held that the agreement upon an arbitral forum should be enforced. It said at pages 516, 517:

> "A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements."

In reaching its conclusion this Court found great support from the *United Nations Convention on the Recognition and Enforce-*

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[1] Printed in App. A, page 2.

[2] The contract was for export of grain from the United States to a foreign buyer having no place of business in the United States. All the jurisdictional complications pointed out by the Court in *Scherk* are equally of concern here.

ment of Foreign Arbitral Awards and the statute for enforcement thereof [9 U.S.C. 201, et seq.].

Similarly, the provisions of the Convention (Article II) were held to require denial of a stay of arbitration in *Antco Shipping Co. Ltd.* v. *Sidermar*, 417 F. Supp 207 (S.D.NY 1976), aff'd without written opinion 553 F 2nd 93 (C.A. 2, 1977); and in *Parsons & Whittemore Overseas Co. Inc.* v. *Societe General de L'Industrie du Papier,* 508 F 2nd 969 (C.A. 2, 1974) the Court enforced a foreign arbitration award on the basis of the Convention. In both cases, opposition was based upon "public policy", but the Courts held that the public policy exception to enforcement under the Convention, must be narrowly construed and should be applied "only where enforcement would violate the forum state's most basic notions of morality and justice" and that the fact that "some national interest may incidentally figure into the resolution of a breach of contract claim does not make the dispute not arbitrable" (*Parsons & Whittemore, supra*, pp. 974, 975).

Petitioner has wholly failed to demonstrate that "the essence of the obligation or remedy [sought to be enforced in arbitration] is prohibited by any pertinent statute or other declaration of public policy". [*Antco* v. *Sidermar,* supra. p. 215]

POINT II

THIS COURT DOES NOT HAVE JURISDICTION TO GRANT CERTIORARI WITH RESPECT TO THE QUESTION OF THE ARBITRATION PANEL; BUT IN ANY EVENT, THE CONTRACT PROVISION FOR APPOINTMENT OF ARBITRATORS SHOULD NOT BE DISTURBED

A) Absence of Jurisdiction

The proceeding to stay the arbitration demanded by Mitsui was commenced by Fribesco in New York State Supreme Court under Article 75 of the New York Civil Practice Law and Rules which governs proceedings involving arbitration in the New

York courts. At no time prior to the filing of the petition for Writ of Certiorari now before this Court, did petitioner ever contend that the Federal Arbitration Act (9 USC Sections 1 to 14 and particularly, Section 2) applied to this proceeding.

This court's jurisdiction on review of the final judgment of a State Court, by Writ of Certiorari, is limited to rights claimed to arise "under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (28 USC 1257(3).)

Petitioner asserts that this Court has jurisdiction, with respect to its objection to the panel from which the arbitrators will be drawn, by virtue of Section 2 of the Federal Arbitration Act (9 USC Section 2) because the contract evidences a transaction involving commerce. Petitioner relies upon the determinations in *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) and *Matter of Weinrott (Carp)*, 32 N.Y. 2nd 190. (1973) These decisions, however, did not hold that simply because a transaction involved interstate commerce, the Federal Arbitration Act should apply. *Prima Paint* merely held that when a proceeding involving a demand for arbitration under a commercial contract is pending in a federal court, the Federal Arbitration Act and its interpretation by Federal Courts, would apply. This Court held at page 405 of its opinion:

> "The question in this case, however, is not whether Congress may fashion federal substantive rules to govern questions arising in simple diversity cases. See *Bernhardt* v. *Polygraphic Co., supra,* at 202, and concurring opinion, at 208. Rather, the question is whether Congress may prescribe *how federal courts are to conduct themselves* with respect to subject matter over which Congress plainly has power to legislate. The answer to that can only be in the affirmative." (emphasis supplied)

Weinrott merely adopted as New York State law, the doctrine announced in *Prima Paint,* that questions of fraud in the

inducement of a contract are for determination by the arbitrators.

Having chosen to litigate this proceeding in the State Courts of New York, under the New York arbitration statutes, petitioner may not now seek a contrary determination from this Court. *Matter of Vigo Corp. (Marship Corp. of Monrovia)*, 26 N.Y. 2nd 157 (1970) cert. den. 400 U.S. 819.

The propriety of the New York State Court decision under the New York State procedural statute, does not raise a federal question under the Federal Arbitration Act.

(B) The Provision for Appointment of the Arbitrators should not be Disturbed

Appendix F of the Petition for Certiorari, (pp. A 27-A 30) contains an excerpt of certain provisions of the Grain Arbitration Rules of the American Arbitration Association.

Adequate provisions have been made under such Rules to insure the appointment of an unbiased panel of arbitrators. The administrator [The American Arbitration Association (or its designated representative) Rule I, §1(d)] is given the discretion to appoint persons to the list of available arbitrators, in addition to those who may be named by the advisory committee of the North American Export Grain Association, (Rule III, §3). No person may serve as an arbitrator if he has any personal or financial interest in the result unless such disqualification is waived by the parties in writing (Rule V §8). Persons appointed as arbitrators must disclose any circumstances likely to affect their impartiality, and information concerning such circumstances received either from the proposed arbitrator or any other source must be disclosed to the parties and a determination must then be made by the administrator as to whether the proposed arbitrator should be disqualified (Rule V, §11). In the event any arbitrator is disqualified, the administrator must declare the office vacant and fill it in the manner provided by the Rules. (Rule V, §12).

Both under New York Law (Civil Practice Law and Rules, §7504) and under the Federal Arbitration Act (9 USC §5), a court is permitted to supersede the procedures for appointment of arbitrators contained in the contract and appoint others only if such method has failed for any reason.

The provision of the present contract for appointment of arbitrators pursuant to the Grain Arbitration Rules has not failed.

Petitioner relies upon *Commonwealth Coatings Corp.* v. *Continental Casualty Co.*, 393 U.S. 145 (1968). In that case, this court vacated an award made by a panel of arbitrators, the "neutral" member of which was regularly engaged as a consulting engineer by one of the parties to the arbitration, which fact had not been previously disclosed to the other party.

No such circumstance is here present. Petitioner's objection is based merely on its contention that the arbitrators who will eventually be appointed are not likely to agree with petitioner's views of the statutory requirements for inspection of grain.

That is no ground to disqualify the panel or its members for bias.

Petitioner contracted to purchase grain for export from the United States under the contract form of the North American Export Grain Association containing the arbitration clause involved. As an experienced trader in grain, Fribesco necessarily understood that the persons who might be named as arbitrators would be likely to have had multiple dealings in grain with the members of the said Association. In such circumstances, petitioner is without justification in challenging in advance, the panel which may be selected. *Garfield & Co.* v. *Wiest*, 432 F 2d 849 (CA-2 1970); *Cook Industries, Inc.* v. *C. Itoh & Co. (American), Inc.*, 449 F 2d 106 (CA 2 1971) cert. den. 405 U.S. 921; *Matter of Amtorg Trading Corp.*, 277 App. Div. 531, (1950) Aff'd. 304 N.Y. 519 (1952); *Matter of Siegel*, 40 NY 2nd 687 (1976).

As long as no arbitrator to be appointed has any financial interest in the result and is not otherwise personally disqualified, the panel of arbitrators will be within the contemplation of the parties when the contract was made. Petitioner has shown no cause whatsoever to order their advance disqualification.

CONCLUSION

Petitioner has failed to set forth sufficient reasons for the issuance of the writ of certiorari prayed for, and the petition should be denied.

Respectfully submitted,

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APPENDIX A

TREATIES, STATUTES AND REGULATIONS

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ABRITRAL AWARDS

* * * * *

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

DEPARTMENT OF AGRICULTURE REGULATIONS

§26.46 Where and when to request an appeal inspection and information required.

* * * * *

(e) *Advanced notice.* If desired by the applicant, a request for an appeal inspection may be filed in advance of an original inspection or reinspection of any gain.

§26.48 Who shall handle appeal inspections and method and order of performance.

(a) *United States.* An appeal inspection on grain located in the United States shall be conducted by a field office.

* * * * *

(e) *New sample.* Upon request of the applicant, and if practicable, a new sample shall be obtained and examined as a part of an appeal inspection.

§26.50 Appeal Inspection by Board of Appeals and Review.

(a) *Formation of Board.* The Board of Appeals and Review in the Grain Division is responsible for the supervision of the official inspection of grain to maintain uniformity and accuracy of inspection, and to perform appeal inspections in accordance with the Act and regulations. For the purpose of this section the Board of Appeals and Review shall be considered a field office with the entire United States and Canada as its circuit.

(b) *Who may request.* An Appeal inspection by the Board of Appeals and Review may be requested by an applicant from an inspection conducted by a field office.

REGULATION 26.110(d) as it read prior to 7/31/75

"§26.110 Mandatory inspection—export grain.

(d) Sampling requirements. (1) The inspection for official grade and official factor information must be based on

official samples obtained from the grain as it is being loaded aboard, or while it is in, the final carrier in which it is to be transported from the United States.

(2) The samples must be obtained by official inspection personnel (other than licensed employees of a grain elevator or warehouse).

(3) If the grain is sampled as it is being loaded aboard the carrier, the sample must be obtained under the final vertical elevation, at such place or places and in such manner as will obtain the most representative sample, and otherwise in accordance with the instructions.

EXCERPT OF REGULATION 26.110(d)(3) AFTER AMENDMENT OF JULY 31, 1975 (40 F.R. 32948)

(3) If the grain is sampled as it is being loaded aboard the carrier, the samples must be obtained after the final vertical elevation, at such place or places, and in such manner as will obtain the most representative sample and otherwise in accordance with the instructions; *Provided,* That after November 1, 1975, all bulk export cargo grain shall be sampled by means of approved diverter-type mechanical samples; *Provided further,* That the Administrator may (i) extend the time to May 1, 1976, in specific cases for an export elevator to complete installation of diverter-type mechanical samplers if the elevator can show that diligent effort has been made to meet the November 1, 1975, deadline; (ii) waive such requirements for (*a*) classes of shipments of sacked grain, which are impracticable to sample with such samplers while the grain is being loaded aboard, or while it is in the final carrier, and (*b*) emergency situations involving mechanical or power failure.

§7504. Court appointment of arbitrator

If the arbitration agreement does not provide for a method of appointment of an arbitrator, or if the agreed method fails or for any reason is not followed, or if an arbitrator fails to act and his successor has not been appointed, the court, on application of a party, shall appoint an arbitrator.